BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	**)**	
	)	
Unbundled Access to Network Elements	**)**	**WC Docket No. 04-313**
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	**)**	**CC Docket No. 01-338**

REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Dated: October 19, 2004

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SUMMARY

The Massachusetts Department of Telecommunications and Energy ("MDTE") hereby submits these reply comments pursuant to the Federal Communications Commission's ("FCC" or "Commission") Order and Notice of Proposed Rulemaking ("NPRM")[1], issued August 20, 2004 in WC Docket No. 04-313 and CC Docket No. 01-338, and published in the September 13, 2004 Federal Register, and in response to the initial comments on the NPRM submitted on or before October 4, 2004. In the NPRM, the Commission adopted interim unbundling rules to replace the rules that were vacated by the U.S. Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") decision

[1] **Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (August 20, 2004).**

in United States Telecom Ass'n v. FCC, 339 F.3d 554 (D.C. Cir. 2004) ("USTA II"). In USTA II, the D.C. Circuit vacated the FCC's unbundling rules for mass market switching (including the UNE platform), dedicated transport, and possibly enterprise market loops.[2] 339 F.3d at 594-595. Essentially, the FCC adopted a standstill order that required incumbent local exchange carries ("ILECs") to continue providing the mass market switching, enterprise market loops, and dedicated transport UNEs at existing (as of June 15, 2004) rates, terms and conditions until the earlier of the effective date of final new unbundling rules, which the FCC committed to issue by the end of 2004, or six months from September 13, 2004, the date the Interim Rules were published in the Federal Register, subject to certain other exceptions. NPRM at ¶ 29. In addition, the FCC proposed a transition plan "to protect [ILEC] interests while also guarding against the precipitous rate increases that might otherwise result," whereby in the event that ILEC unbundling obligations are eliminated after the interim period, ILECs would be permitted

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[2] **The USTA II decision was somewhat ambiguous as to whether enterprise market loops were also vacated. In the NPRM, the FCC stated, "[w]e do not take a position on that question here; but to ensure a smooth transition governed by clear requirements, we assume arguendo that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules." NPRM at n.4.**

to increase monthly UNE-P rates by one dollar and rates for enterprise loops and dedicated transport by 15 percent. Id. The FCC stated that, subject to comments, it intended to adopt the transition plan. Id.

In the NPRM, the FCC seeks input on developing new unbundling rules that will satisfy the shortcomings in the FCC's impairment determinations identified by the D.C. Circuit in USTA II. Id. at ¶ 9. In particular, the FCC seeks comment on defining "relevant markets (e.g., product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries" required by USTA II. Id. In addition, the FCC requested input on how it should take into account ILEC tariff offerings and Bell Operating Company ("BOC") Section 271 access obligations in its impairment analysis. Id. Also, the FCC seeks input on "how to respond to the D.C. Circuit's guidance on other threshold factors, including the relationship between universal service support and UNEs." Id. In addition to "threshold unbundling issues," the FCC also seeks comment on what specific network elements should be unbundled and requests commenters to provide "evidence at a granular level." Id. at ¶ 11. The FCC also encouraged carriers and state commissions to submit granular evidence of impairment from state Triennial Review Order ("TRO") investigations, including summaries of the factual information as well as the underlying data. Id. at ¶ 15.

In these reply comments, the MDTE addresses three discrete issues raised in the NPRM and parties comments: (1) whether and how the FCC should take into account

ILEC tariff offerings and BOC Section 271 access obligations in its impairment analysis; (2) the relationship between universal service support and UNEs in the FCC's impairment analysis; and (3) whether the FCC should clarify BOC independent Section 271 unbundling obligations in light of USTA II. In addition, the MDTE provides a procedural summary of its TRO investigations as Attachment I to these Reply Comments.[3] Although

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[3] **On August 23, 2004, the MDTE sent a notice to parties in its TRO case investigating mass market switching, high capacity loops, and dedicated transport, suggesting that the parties "confer with each other and . . . provide the [MDTE] with a joint statement proposing the summary or summaries of the data to be submitted to the FCC" in response to the FCC's request for data in the Interim Rules Order. Several parties responded to the MDTE's memorandum, either proposing a joint data collection effort with the MDTE or attempting to dissuade the MDTE from undertaking such an effort. Given the very short time-frame provided by the Interim Rules Order in which to respond to the FCC's request, and because the MDTE stayed its TRO proceeding before any formal evidence was admitted into the record and before the MDTE made any findings on the parties' information relative to the FCC's "triggers" impairment analysis, the MDTE determined not to file data**

the MDTE did not conduct its own impairment analysis for Massachusetts, based on data from its TRO investigation or other information, the MDTE recommends that the Commission give substantial weight to such analyses from other state commissions, since state commissions are uniquely suited to make such determinations. See, e.g., Comments of the New York Department of Public Service at 4-18 (October 4, 2004).

I. DISCUSSION

A. ILEC Tariffed Services and BOC Section 271 Access Obligations

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from its TRO proceeding with the FCC and instead suggested that parties, if they choose, submit to the FCC the information compiled in the MDTE proceeding that they deem is appropriate.

In USTA II, in response to the FCC's position that special access availability should be irrelevant to the impairment analysis, the D.C. Circuit held that the FCC's "impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." 339 F.3d at 575-578. Thus, the D.C. Circuit recognized that the FCC could not limit the impairment analysis to a comparison of unbundling versus only self-provisioning or third-party provisioning; the analysis had to also include the availability of ILEC tariff offerings, such as special access services, and BOC service offerings made pursuant to Section 271, including resold telecommunications services offered pursuant to Section 251(c)(4).[4] Id. The D.C. Circuit stated that "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition. Where competitors have access to

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[4] **We assume the D.C. Circuit in referring to resold services under Section 251(c)(4) meant that the FCC had to compare whether a facilities-based CLEC could compete using ILEC facilities offered at "resale" rates, not that the FCC had to analyze whether facilities-based CLECs could compete using Section 251(c)(4) resale services, which under the Act are intended for non-facilities-based carriers.**

necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling." Id. at 576. The D.C. Circuit noted, however, that it there may be valid reasons for a "blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment" but that the FCC failed to even consider the issue. Id.

Although set forth in a discussion of access to UNEs by wireless carriers, the MDTE interprets the D.C. Circuit's holding to apply equally to CLECs and to require the FCC to undertake an economic analysis of whether CLECs can compete with ILECs using ILEC tariffed services and/or Section 271 services instead of UNEs. In conducting this analysis, the FCC must thoroughly consider the economics of providing competing retail service using ILEC non-UNE wholesale services and determine whether CLECs can compete with Verizon for various customer classes. In particular, the MDTE agrees with those commenters in this proceeding who contend that this analysis must include a determination of whether CLECs will experience a "price squeeze" as a result of Verizon wholesale services being priced higher than the retail services against which CLECs compete.[5] See, e.g., Comments of AT&T Corp. at 91-101 (October 4, 2004); Comments of the Association for Local Telecommunications Services at 18 (October 4, 2004); Joint Comments of the Loop and Transport CLEC Coalition at 48-52 (October 4, 2004). Clearly, the FCC must

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[5] **The price squeeze can also work the opposite way whereby the ILEC, where it has pricing flexibility for retail services without price floor controls, sets its retail rates at or below its special access prices.**

find that a CLEC is impaired if the wholesale rates charged by Verizon are higher than Verizon's downstream retail rates, or if not higher, then high enough when added to the retailing costs of an efficient CLEC to produce a price squeeze.[6] The D.C. Circuit could not have intended for the FCC to find non-impairment under such anti-competitive pricing circumstances.

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6 **If, however, the price squeeze is the result of implicit subsidies built into ILECs' retail rates, then the FCC must take this into account (see discussion below at pps. 11-12).**

The FCC's economic analysis must taken into account not just the expense side but also the revenue opportunities of CLECs for different customer classes. While use of special access services as a replacement for high capacity DS3 UNE facilities may be economically viable for CLECs serving large enterprise customers, the revenue opportunities for small to medium-sized enterprise customers may not be sufficient to allow an efficient CLEC to compete using DS1 special access wholesale facilities.[7] As the D.C. Circuit pointed out, some of the strongest evidence that CLECs can compete using ILEC non-UNE wholesale services is evidence that CLECs are doing just that. See e.g.,

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[7] **The impairment analysis should not guarantee CLECs the widest possible profit margin. In fact, the D.C. Circuit said that it should not. See USTA II, 339 F.3d at 576 ("[T]he purpose of the Act is not to ... guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate"). However, the analysis of CLEC expenses compared with revenue opportunities should determine at least whether some profit margin exists.**

USTA Comment at 20 (October 4, 2004). Therefore, the FCC's economic analysis should account for evidence of CLECs that are using special access, instead of UNEs, to provide local exchange and exchange access services.

In examining special access pricing in a closely related context, the MDTE found that special access pricing can be a barrier to entry to competing carriers. In considering whether to grant Verizon pricing flexibility for its retail private line services, the MDTE agreed with CLECs that "special access pricing is a barrier to entry for CLECs that want to compete against Verizon's retail private line services because special access services impose higher costs on CLECs than are imposed on Verizon." Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' Intrastate Retail Telecommunications Services in the Commonwealth of Massachusetts, D.T.E. 01-31-Phase I, at 61 (May 8, 2002). The MDTE stated:

> **CLECs that seek to provide services in competition with Verizon's retail private line services incur economically-inefficient wholesale costs since the wholesale inputs (special access services) that the CLECs purchase are not priced at incremental cost; rather, these inputs, because of historical universal service policies, are priced well above incremental cost. The record shows that because there is a significant cost differential between Verizon's wholesale costs and potential entrants' wholesale costs, entrants may have difficulty exerting downward competitive pressure on Verizon's retail rates if Verizon raises retail prices above economically efficient levels. Contrary to Verizon's claims, the resale of its private line services does not correct this problem. Resellers cannot exert sufficient competitive pressure to push prices down to economically efficient levels because a reseller's cost floor is tied to Verizon's retail price.**

> **Moreover, Verizon has not adequately supported its claim that the special access market is competitive on a statewide basis.**

Id. at 61-62 (footnotes and citation omitted). As a result, in contrast with the MDTE's approval of pricing flexibility for the vast majority of Verizon's retail business services, the MDTE denied Verizon's request for pricing flexibility for private line services, unless Verizon priced special access at UNE-like levels (incremental cost plus a reasonable mark-up for indirect costs), which Verizon chose not to do. Id. at 62; see D.T.E. 01-31-Phase II, at 23-25 (April 11, 2003).

Even if the FCC's economic analysis shows that CLECs can compete against ILECs in the retail market using ILEC special access services at current rates, the FCC must also determine that the characteristics of the special access market will ensure that wholesale rates remain at a level that ensures sustained retail competition. ILECs have not been given pricing flexibility for interstate special access in all Metropolitan Statistical Areas nationwide, and even in those markets where the FCC has granted pricing flexibility, there may not be sufficient actual or potential competition to keep special access rates at a reasonable level. See Access Charge Reform, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14221 (1999) ("Pricing Flexibility Order"). Before determining that special access services are a substitute for UNEs, the MDTE agrees with those commenters who argue that the FCC should fully resolve any doubts about the competitive nature of the wholesale special access market and whether the competitive conditions in the special access market are sufficient to produce and maintain reasonable rates. See, e.g., Joint

Comments of the Loop and Transport CLEC Coalition at 41-46 (October 4, 2004); Comments of the Association for Local Telecommunications Services at 23-27 (October 4, 2004); Comments of AT&T Corp. at 103-109 (October 4, 2004); see also AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM No. 10593 (filed Oct. 15, 2002).

Should the FCC decide that special access is an economic alternative to UNEs for purposes of allowing CLECs to compete in the enterprise market, the FCC must also determine whether sufficient controls exist to prevent discrimination with respect to the quality of ILECs' special access services (e.g., the quality of the facilities; quality of the installation, maintenance and repair, etc.).[8] If the special access market is not truly competitive, or at least only competitive in some geographic areas (i.e., competitive for certain end-user locations and transport routes), ILECs may not have sufficient incentive to provide high quality service, absent the type of legal requirements that are imposed on the service quality of UNEs. Any profit maximizing firm in such a situation would act out of self interest and discriminate against its competitors in the retail market, if the payoff for eliminating that retail competition is greater than the cost of reduced wholesale sales to that CLEC. Therefore, should the FCC allow substitution of special access services for

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8 **Because of the FCC's "10 percent rule", where a special access circuit qualifies as interstate if more than 10 percent of the traffic carried over the facility is interstate, the vast majority (in Massachusetts, for example, more than 99 percent) of ILEC special access circuits are interstate. Thus, for all practical purposes, the FCC has sole responsibility for special access service quality issues.**

UNEs, the FCC must adopt safeguards to ensure a reasonable level of service quality, in those markets where competitive forces can not be relied upon to do so. The MDTE recommends that the FCC adopt performance standards and penalties similar to the standards and penalty plans in place at the state level for UNEs, and, to that end, urges the FCC to complete its special access performance metrics NPRM that has been pending since 2001. See Comments of the Association for Local Telecommunications Services at 27-29 and n.27 (October 4, 2004) citing Performance Measurements and Standards for Interstate Special Access Services, Notice of Proposed Rulemaking, 16 FCC Rcd 20896, ¶ 13 (2001).

B. Relationship Between Universal Service Support and UNEs

In USTA II, the D.C. Court found fault with the Commission's decision to "consider regulated below-cost retail rates as a factor that may 'impair' CLECs in competing for mass market customers." USTA II, 339 F.3d at 572-573. As the Court stated:

> **The interesting case is the one where TELRIC rates are so low that unbundling *does* elicit CLEC entry, enabling CLECs to cut further into ILEC revenues in areas where ILECs' service is mandated by state law – and mandated to be offered at artificially low rates funded by ILECs' supracompetitive profits in other areas. If the scheme of the Act is successful, of course, the very premise of these below-cost rate ceilings will be undermined, as those supracompetitive profits will be eroded by Act-induced competition. In competitive markets, the ILEC can't be used as a pinata. The Commission has said nothing to address these obvious implications, or otherwise to locate its treatment of the issue in any purposeful reading of he Act.**

Id. at 573. In the NPRM, the FCC asked parties to comment on the relationship between universal service support and UNEs. NPRM at ¶ 9.

The MDTE disagrees with those commenters who assert that the FCC, in fashioning new impairment rules, should consider universal services subsidies in state retail rates as part of its impairment analysis. See e.g., Joint Comments of the Loop and Transport CLEC Coalition at 29-30 (October 4, 2004). Although implicit universal service subsidies can result in a price squeeze for CLECs between the UNE rates CLECs pay ILECs and ILECs' own retail rates, the proper forum to address the competitive impact of universal services subsidies, as the FCC has previously made clear, is at the state level. When the FCC, pursuant to the Act, put in place the current federal universal support system, it stated that it did not attempt "to identify existing implicit universal service support effected through intrastate rates or other state mechanisms" or "to convert such implicit intrastate support into explicit federal universal support." In the Matter of Federal-State Board on Universal Service, CC Docket 96-45, Report and Order, FCC 97-157, at ¶ 14 (May 8, 1997). Rather, the FCC concluded "[s]tates, acting pursuant to sections 254(f) and 253 of the [Act], must in the first instance be responsible for identifying intrastate implicit universal support" and that "as competition develops, the marketplace will identify intrastate implicit universal service support, and that states will be compelled by those marketplace forces to move that support to explicit, sustainable mechanisms consistent with section 254(f)." Id.

States have legitimate tools available to them to address universal service subsidies. As the MDTE has pointed out in the past, state commissions can re-balance retail rates

and/or adopt a competitively neutral funding mechanism to address an implicit universal subsidy-induced price squeeze. See Reply Comments of the Massachusetts Department of Telecommunications and Energy, WC Docket No. 03-173, at 7-8 (filed January 30, 2004) (citations omitted) ("MDTE Reply Comments in FCC TELRIC NPRM"). The MDTE first re-balanced Verizon's retail rates during a multi-year process in the early 1990s that increased the dial tone line rate from $1.19 to $9.91 and again in 2003 with an additional increase in the dial tone line rate to $12.36. Id. In addition, in May 2004, the MDTE announced its intent to seek explicit statutory authority from the Massachusetts Legislature to establish a competitively-neutral instate universal service fund ("USF"). See Letter Order Denying Richmond NetWorx's Request for Department to Investigate Establishment of USF, D.T.E. 03-45, at 3-4 (May 12, 2004). The MDTE determined that it was necessary for it to have explicit state authority to adopt an instate USF, prior to investigating the need for such a fund in response to a petition from a rural CLEC that alleged a price squeeze between rural zone UNE loop rates and statewide averaged Verizon retail rates containing implicit subsidies. Id. The FCC should encourage other states to do the same and should not take universal service subsidies into account in its impairment analysis.

C. BOCs' Independent Section 271 Unbundling Obligations

In the TRO, the FCC found that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and

signaling regardless of any unbundling analysis under section 251." TRO at ¶ 653. The FCC also determined that BOCs were not required to combine network elements that are no longer required to be unbundled under Section 251. Id. at n.1990. Regarding pricing, the FCC held that network elements made available under Section 271 are to be priced at the just and reasonable standard of Sections 201 and 202 of the Act. Id. at ¶ 656. The Commission stated:

> **Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.**

Id. at ¶ 664. In the NPRM, the FCC sought comment on whether BOCs' independent Section 271 unbundling obligations need to be clarified or modified in light of USTA II. NPRM at n.38, citing BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245 (filed July 1, 2004) (petitioning the FCC to assert exclusive jurisdiction over the enforcement of Section 271 and preempt state commission rulings asserting jurisdiction over the rates, terms, and conditions of Section 271 network elements).

The MDTE agrees with those commenters that argue that the Commission should clarify BOCs' Section 271 obligations. See e.g., Comments of the Pennsylvania Public Utility Commission at 4 (October 4, 2004). In particular, the FCC should clarify that Section 271 and the FCC's implementing rules do not preempt the entirety of state commissions' jurisdiction under state common carrier laws over Section 271 network elements when a BOC offers those elements as intrastate common carriage. The FCC's authority under Section 271 to enforce unbundled access to checklist elements is to determine the conditions for BOCs to be permitted to enter, and to continue to serve, the interLATA market. State commissions, such as the MDTE, have general regulatory authority over intrastate common carrier services to enforce the obligation of "every" common carrier to file tariffs under state law, including tariffs for Section 271 network elements. See Proceeding by Department of Telecommunications and Energy on its own Motion to Implement Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops, D.T.E. 03-59-A, Order on Reconsideration at 8 n.9 (2004) (noting that Verizon should tariff its Section 271 enterprise switching network elements in a separate non-UNE tariff because these elements are "jurisdictionally intrastate common carriage subject to [MDTE] approval," but that "[w]hether those market-based rates continue to meet Verizon's Section 271 obligations, however, is for the FCC to determine"); see also Mass. Gen. L. c. 159, §§ 12, 19. The FCC's jurisdiction to determine the

reasonableness of rates for Section 271 network elements and state commissions' jurisdiction to enforce the filing of tariffs for common carrier services can and should coexist.

It would be speculative and premature for the FCC to determine that all common carrier tariff enforcement activities by state commissions are preempted, particularly where the FCC does not have the relevant state statutes in front of it to determine the existence of a conflict. Notwithstanding its authority to require tariff filings for Section 271 network elements provided by common carriers, the MDTE intends to defer to any FCC findings regarding the reasonableness of Section 271 elements' rates, terms, and conditions offered in Massachusetts.

II. CONCLUSION

In closing, the MDTE asserts that in taking into account ILEC tariffed offerings and BOC Section 271 access obligations in its impairment analysis, the FCC must consider whether CLECs can compete with Verizon on a retail basis using special access and other existing ILEC non-UNE offerings and whether there are sufficient safeguards to ensure that the rates and service quality for ILEC non-UNE offerings will remain reasonable if the FCC deems these services to be substitutes for UNEs. In addition, the MDTE contends that the FCC should not take universal service implicit subsidies into account in its impairment analysis, because the Act and FCC directives already require state commissions to remove implicit subsidies from ILEC retail rates. Also, the MDTE urges the FCC to clarify that its

authority to determine the reasonableness of the rates, terms, and conditions for BOC Section 271 network elements does not preempt state commission authority under state common carrier statutes from requiring BOCs to tariff Section 271 network elements when such wholesale services are offered as common carriage. Finally, to the extent the impairment debate is impacted by existing flaws in the FCC's Total Element Long-Run Incremental Cost ("TELRIC") pricing rules, the MDTE urges the FCC to quickly complete its TELRIC NPRM and to set rates representative of ILECs' actual forward-looking incremental costs by taking into account the real-world attributes of an ILEC's existing network. See MDTE Reply Comments in FCC TELRIC NPRM.

Respectfully submitted,

Commonwealth of Massachusetts
Department of Telecommunications and Energy

By:

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

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October 19, 2004

ATTACHMENT I

SUMMARY OF M.D.T.E. PROCEEDINGS

I. INTRODUCTION

Shortly after the FCC released the Triennial Review Order, the MDTE opened an investigation to implement the requirements of the FCC's order specifically relating to switching for mass market customers. The matter was docketed as D.T.E. 03-60. The MDTE also opened a companion proceeding, D.T.E. 03-59, to address the requirements of the FCC's Triennial Review Order regarding switching for enterprise customers.

II. D.T.E. 03-60

In its Vote and Order Opening Proceeding, D.T.E. 03-60 (August 26, 2003), the MDTE requested that interested entities file requests for participation in the D.T.E. 03-60 docket, indicating their interest and the extent to which they sought to participate. On September 9, 2003, the hearing officer issued a procedural memorandum indicating that the MDTE's nine-month proceeding in this docket would also include analyses of the loop, transport, and hot cut issues raised by the Triennial Review Order. The MDTE received written comments and intervention petitions from Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"); AT&T Communications of New England, Inc. ("AT&T"); Allegiance Telecom, Inc. ("Allegiance"); United States Department of Defense and all other Federal Executive Agencies ("DOD/FEA"); BridgeCom International, Inc. ("BridgeCom"); Covad Communications Company ("Covad"); Sprint Corporation

("Sprint"); MCI; and Conversent Communications of Massachusetts, Inc. ("Conversent"). The MDTE received joint comments and requests to intervene from BridgeCom, Broadview Networks, Inc., Choice One Communications of Massachusetts, Inc., Focal Communications Corporation of Massachusetts, and XO Massachusetts, Inc. (collectively, "Loop Transport Carrier Coalition"). The MDTE also received joint comments and requests to intervene from Bullseye Telecom, Inc., Broadview, InfoHighway Communications Corporation, McGraw Communications, Inc., MetTel, Talk America, Inc., and Z-Tel Communications, Inc. (collectively, "CLEC Coalition"). In addition to the above, the MDTE received requests to participate from United Systems Access Telecom, Inc. ("USAT"); DSCI Corporation ("DSCI"); Richmond Connections, Inc. d/b/a Richmond Networx ("Richmond Networx"); Granite Telecommunications, LLC ("Granite Telecom"); DSLNet Communications ("DSLNet"); Lightship Telecom, LLC ("Lightship Telecom"); RCN-BecoCom, LLC ("RCN"); RNK, Inc. d/b/a RNK Telecom ("RNK"); and Communications Workers of America, District 1 ("CWA"). Pursuant to M.G.L. c. 12, § 11E, the Attorney General for the Commonwealth of Massachusetts ("Attorney General") filed a notice of intervention in this proceeding.

On October 3, 2003, Verizon notified the MDTE that Verizon would not be contesting the FCC's impairment determinations for loops, transport, or switching by making a "potential deployment" showing that addressed operational or economic barriers in Massachusetts (October 3, 2003 Letter from Verizon to MDTE Secretary at 1). Rather,

Verizon would contest the FCC's impairment determinations based solely on the "triggers" set forth by the FCC in the Triennial Review Order (id.). On November 14, 2003, Verizon filed with the MDTE its Initial Testimony, and on December 19, 2003, Verizon filed Supplemental Testimony supporting its triggers case. The MDTE also established an open discovery period beginning November 24, 2003, running until two weeks before the scheduled evidentiary hearings.[1] During the open discovery period until the proceeding was ultimately stayed by the MDTE, hundreds of requests for information were exchanged. The MDTE also issued information requests to carriers operating in Massachusetts that did not participate as parties in the MDTE's impairment investigation.

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[1] **At that time, the evidentiary hearings were scheduled to run March 22, 2004 through April 2, 2004.**

Also in November 2004, the MDTE divided its D.T.E. 03-60 proceeding into two tracks: Track A to investigate the impairment issues relating to loops, transport, and mass market switching; and Track B to investigate Verizon's three hot cut proposals.[2] On February 6, 2004, the following CLECs filed rebuttal testimony: in Track A (Impairment Issues) – Allegiance, AT&T, CLEC Coalition, Conversent, Covad, DOD/FEA, Loop Transport Carrier Coalition, and MCI; and in Track B (Hot Cuts)– Covad, AT&T/Broadview, and MCI. On February 25, 2004, Verizon filed reply testimony in both Tracks A and B.

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court") vacated and remanded portions of the FCC's Triennial Review Order. United States Telecom Association v. Federal Communications Comm'n, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"). On March 3, 2004, Verizon filed a motion with the MDTE requesting that, given the D.C. Circuit Court's decision in USTA II, the MDTE stay Track A (Impairment Issues) of the MDTE's D.T.E. 03-60 proceeding, but go forward with Track B (Hot Cut Issues). On March 4, 2004, the MDTE issued a Hearing Officer

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[2] **The MDTE's D.T.E. 03-60 Track B investigation consisted of analyses of Verizon's proposed batch hot cuts and "large job" hot cuts processes in response to the FCC's requirements in the Triennial Review Order (see D.T.E. 03-60, at 24-40, Verizon Initial Testimony (November 14, 2003)), as well as an evaluation of Verizon's proposed Wholesale Provisioning Tracking System ("WPTS") process for individual hot cuts, an issue imported from the MDTE's UNE Rates Proceeding, D.T.E. 01-20. See D.T.E. 03-60, at 2, Hearing Officer Memorandum (November 24, 2003) (expanding the D.T.E. 03-60 investigation to review WPTS for the purpose of adopting a more efficient manual hot cut process for non-batch hot cuts).**

Notice, staying the D.T.E. 03-60 proceeding for three weeks in order to receive comments from the parties on Verizon's motion and the jurisdictional basis for going forward with this proceeding given the D.C. Circuit Court's decision in USTA II. On April 2, 2004, given the uncertainty created by USTA II, the MDTE stayed indefinitely its D.T.E. 03-60 proceeding.

At the time the MDTE stayed its D.T.E. 03-60 proceeding, it had received pre-filed initial and reply testimony from the parties concerning a "triggers" analysis in Massachusetts (consisting of hundreds of pages of confidential and public information), as well as hundreds of responses to requests for information. However, the MDTE had not yet conducted evidentiary hearings, evaluated parties' legal arguments in briefs, or established findings of fact or conclusions of law.

III. D.T.E. 03-59

In its Vote and Order Opening Proceeding, the MDTE ordered that the 90-day D.T.E. 03-59 investigation not proceed unless at least one competitive local exchange carrier requested that the MDTE proceed. D.T.E. 03-59 (August 26, 2003). The MDTE received requests to proceed from DCSI Corporation, InfoHighway Communications Corporation, and American Long Lines, Inc. The MDTE also ordered parties that wished to participate in this investigation to file a request to participate and comments on the nature, scope, and timing of the proceedings. The MDTE received requests to participate and comments from Allegiance, DCSI, CWA, InfoHighway, Lightship, MCI, Richmond

NetWorx, RNK, DOD/FEA, Sprint, Z-Tel, and Verizon. The Massachusetts Attorney General filed a notice of intervention.

The MDTE conducted a public hearing and procedural conference on September 25, 2003. At the procedural conference, the MDTE directed any participant wishing to challenge the FCC finding of non-impairment to file an offer of proof setting forth the facts to be shown that would support a finding of impairment. On October 15, 2003, DSCI and InfoHighway submitted a joint offer of proof, and on October 27, 2003, Verizon filed a response to the offer of proof.

The MDTE found that the facts alleged by DCSI and InfoHighway provided no basis for the MDTE to seek a waiver of the FCC finding of non-impairment for enterprise switching, and the MDTE closed the investigation. Order Closing Investigation, D.T.E. 03-59 (November 25, 2003). On December 15, 2003, DSCI and InfoHighway filed a motion for clarification and partial reconsideration of the Order Closing Investigation, and the MDTE denied the motion on January 23, 2004. Reconsideration Order, D.T.E. 03-59 (January 23, 2004). On February 12, 2004, Verizon filed a motion for partial reconsideration of a portion of the Reconsideration Order unrelated to the MDTE's decision to not seek a waiver of the FCC finding of non-impairment. As of the date of these comments Verizon's motion is still pending.